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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-293

IRRIGATION AND POWER EQUIPMENT, INC. a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation, doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Petitioners,

v.

SIMS CONSOLIDATED, LTD.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I. THE OPPOSING BRIEF MISSTATES THE HISTORY OF THE CASE AND THE ISSUES OF THIS APPEAL

A. Respondent takes advantage of the limited record established as the Appendix to the Petition herein and of the fact that briefs of the parties before the Court below are not

here available. With that advantage at hand, respondent asserts, at Page 3 of the Opposing Brief:

> "On appeal, however, petitioners did not challenge the correctness of the holding of the trial court . . . that only domestic . . . law applies to the contract in suit."

To the contrary, petitioner's Opening Brief on Appeal sets forth the following argument at page 34:

> "C. AUSTRALIAN LAW CONTROLS AND RENDERS THE CONTRACT VOID."

Petitioner's Brief on Appeal then continues for more than three pages to "challenge the correctness of the holding of the trial court . . . that only domestic . . . law applies to the contract in suit."

B. On Page 2 of the Opposing Brief on file here, counsel states:

> ". . . the testimony of all the witnesses was taken by deposition on oral examination as provided in Rule 30 Federal Rules of Civil Procedure; . . ."

The order of the trial court entered July 12, 1973, and contained at Page 44A and 45A of the Appendix states that:

> "The parties, with the Chief Judge, agreed (Read 'Elected') to proceed by trial on depositions. . ."

Please note the absence of any reference to Rule 30 FRCP. Only the depositions whose transcripts the trial judge refused to read were taken under Rule 30. The videotape testimony was trial testimony taken somewhat in the fashion of a deposition. Petitioners have questioned at Pages 20 and 21 of the petition whether that testimony was properly

characterized as a "deposition" at all and it certainly was not a "deposition" which Rule 30 FRCP or Rule 32 FRCP contemplate. A total lack of attention to the rudimentary requirements of Rule 30 FRCP by the parties, including the failure to present such depositions to the witnesses for signature demonstrates this fact.

II. PETITIONERS WERE DENIED RIGHT OF COUNSEL WHEN THE TRIAL JUDGE FAILED TO READ "EVERY WORD OF EVERY DEPOSITION."

On Page 4 of the opposing brief, respondent asserts that this court "should not grant certiorari to determine whether or not a district judge must read every word of every deposition at every stage of a case as a prerequisite to rendering judgment in that case, . . .". Under the unique procedure by which this case was tried, that is the exact question. Where a trial judge has heard a trial in open court his reading of all depositions may not be required, but where all testimony was taken out of his presence in the first instance, isn't his thorough and independent review required? The trial judge told the parties he had completed a thorough review. In this suit, after the "trial" testimony on liability had been completed and as oral argument was about to commence, the trial judge stated in open court:

> ". . . the Court will allow . . . an hour to a side. . . .
>
> ". . . the Court has either viewed the videotapes or the depositions as to *all* individuals. . . . (Emphasis supplied)
>
> ". . . I think counsel have a right to know exactly where we stand right now so this might assist you in your presentation of what you think might be concentrated on, as the case might be."
> (Record on Appeal, Vol. I, p. 4)

With that introductory representation by the judge, counsel undertook oral argument on the liability issue. Counsel had no way of determining that the judge had not read the testimony of four out of nine witnesses and, that he didn't intend to. Counsel certainly have a right to rely on representations of a trial judge that he has performed the duties of his office. When counsel does so in framing his oral argument for purposes of emphasis, then to the extent that representations later prove to be without basis in fact, the client has been deprived of the right to effective counsel.

III. THE PETITION COMPLIES WITH THE RULES OF THIS COURT.

Respondent has also raised anew, compliance by petitioner with Rule 40 of this Court in the following respects:

A. **Relevancy.** (Brief, p. 5)

Respondent contends argument on application of the IMF Articles to be irrelevant because such an assertion by petitioner first requires application of Australian law when the trial court has not done so and the court below affirmed. Respondent misses the point.

The facts are not in dispute with respect to the failure of respondent to secure permission of the bank, before entering into the contract, as was required by the Australian law. Respondent came to the United States with that contract in hand and sought enforcement. The trial judge refused to give extra-territorial effect to the Australian law and found California law to be applicable. All that has nothing to do with the IMF Articles.

First, of course, is the well known rule that contracts may be unenforceable even though they are neither

void nor voidable. Williston, *Contracts*, 3rd Ed. Second, the pertinent IMF Article is directed to contracts "which involve the currency of any member and which are contrary to the exchange control regulations of that member. . . ." Here, it is the Australian currency regulations which have been violated and the trial judge did not rule to the contrary. He simply found California law to be applicable on validity in attempting to solve the dispute between the parties. It is hardly irrelevant to point out that, under the IMF Articles, the question ceases to be one solely between the parties and comes into focus as one where their interests are to be subordinated to the superior concern of the public good in general all as proclaimed by the treaty. 17 Am. Jur. 2d *Contracts*, Section 232. The error of the trial court was not confined to refusing to apply Australian law in favor of the law of California; rather, that error was compounded in failing to apply the IMF Articles which supercede the California law and declare the contract to be unenforceable anywhere in the United States irrespective of the validity of the contract under the law of one of those states.

B. Burdensomeness. (Brief, p. 6)

Here respondent chastises petitioner for setting forth the facts. It was for the convenience of the court. The assertion is ridiculous on its face.

C. Scandalous Charges. (Brief, p. 6)

Respondent contends that there is no evidence to support the surreptitious or deceitful conduct of respondent's application to the bank for the belated approval of the contract required by Australian law. Admittedly, respondent's continuous use of the truth as a device to be bent and twisted requires petitioner to refer to additional record references which may cause burdensomeness, but petitioner has no other

choice. CMP's Broinowski was asked whether CMP disclosed to the bank, at the time application was made for approval, that the contract has been rescinded. Broinowski answered:

> "I know there were no conferences with the bank ... just that exchange of letters which is on the record."
> (App. in the Tenth Circuit, Vol. I, pp. 210-211)

D. MATERIALITY. (Brief, p. 6)

Respondent quotes and relies on the decisions of the lower courts (as to which review is sought) and questions the right of the petitioner to challenge them both on procedure and merit. Respondent can take no comfort from the situation in the trial court which ended in respondent's favor. No party, in determining its trial tactics may justifiably rely on the correctness of the trial court's rulings. *Gore v. Northeast Airlines,* 373 F.2d 717 (CA 2 1967).

IV. WINGO IS CONTROLLING.

Both respondent and the court below have trouble in understanding petitioner's reliance on *Wingo v. Wedding,* 418 U.S. 461 (1974). It is so recent a decision that we do not desire to take up the time of the Court in a complete review. Suffice it to say that it is a most apt declaration of the prevailing law applicable to the question at hand. The fact that in *Wingo, supra,* the procedure found to be wanting had been undertaken by virtue of a local rule of court is irrelevant. The election required of the parties pursuant to the chief judge's order in this case is the exact equivalent of the local rule in *Wingo,* which allowed a magistrate to conduct an evidentiary hearing with electronic recording to be thereafter heard by the judge in a *de novo* fashion. The Habeas Corpus Act, 28 U.S.C. Section 2243, which this court held in *Wingo*

required the "court" to conduct the hearing is nothing more than its equivalent in civil law found at Rule 77(b) FRCP which requires:

> "All trials upon the merits shall be conducted in open court. . . ."

Wingo reaffirms those elements necessary to establish a trial; it makes no difference how that trial was denied to the litigants.

V. BAD FACTS TEND TO MAKE BAD LAW.

Both courts below and respondent (more understandably) have found the rescission by L&B after six years of so-called compliance with the contract to be conduct sufficient to bring wrath down upon L & B and A. O. Smith. Petitioners acknowledge that a heavy burden descends upon a party who cancels or rescinds an existing contract. He is met with charges such as "why did you sign it at all" or "why didn't you know all this before".

Petitioners submit that they have met the burden when they are able to show that, 1. this contract was entered into without any counsel being present. Even the counsel who had participated in earlier drafting is not now counsel for L&B nor is Sims represented by its then current counsel. The parties can hardly be criticized for not understanding the legal effect of their acts; 2. twice before the rescission, L&B requested contract relief from CMP and it was contumaciously rejected; and 3. the key factor in rescission was the failure of CMP (without L&B's knowledge) to secure prior bank approval thus rendering the contract void in the opinion of L&B's Australian solicitor. When L&B found out that CMP could take all the fruits of the contract and refuse compliance at any time because of Australian currency regulations and

the IMF Articles, L&B rescinded. CMP provided a perfectly reasonable ground for rescission by L&B in undertaking entry into an unenforceable agreement. L&B cannot be estopped from rescission prior to its knowledge of the illegality of the contract. 17 Am. Jur. 2d *Contracts,* Section 511.

To permit the decisions of the lower courts to stand will result in petitioner's being penalized for now knowing that CMP had violated the laws of its own country. That is injustice.

VI. CONCLUSION.

The Petition for Certiorari previously filed herein should be granted to correct the injustice suffered as a result of the denial of due process to the petitioner and frustration of public policy set forth in the IMF Articles all as fully outlined in the Petition for Certiorari.

Respectfully submitted,

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October 10, 1975 *ATTORNEYS FOR PETITIONERS*